United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1218

To be argued by
JO ANN HARRIS

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1218

UNITED STATES OF AMERICA,
Appellee,

—v.—

RICHARD WIENER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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2

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	3
The Trial:	
The Government's Case	3
The Defense Case	8
The Government's Rebuttal Case	9
The Suppression Hearing:	
The Government's Case	10
The Defense Case	13
The Government's Rebuttal Case	15
ARGUMENT:	
POINT I—The trial court correctly found that Wiener consented to the search of his apartment	16
POINT II—The loaded gun found in Wiener's apartment was relevant to the case and created no unfair prejudice	24
POINT III—There was no error in the trial judge's instructions to the jury	30
CONCLUSION	37

TABLE OF CASES

PAGE

Channel v. *United States*, 285 F.2d 217 (9th Cir. 1960) 19

Devine v. *United States*, 403 F.2d 93 (10th Cir. 1968), *cert. denied*, 394 U.S. 1003 (1969) 33

Gorman v. *United States*, 380 F.2d 158 (1st Cir. 1967) 18, 23

Harrington v. *California*, 395 U.S. 250 (1969) 30

Judd v. *United States*, 190 F.2d 649 (D.C. Cir. 1951) 19

McClard v. *United States*, 386 F.2d 495 (8th Cir. 1967), *cert. denied*, 393 U.S. 866 (1968) 27

Miranda v. *Arizona*, 384 U.S. 436 (1966) 10

Moody v. *United States*, 376 F.2d 525 (9th Cir. 1967) 26, 28

Morton v. *United States*, 183 F.2d 844 (D.C. Cir. 1950) 27

Schneckloth v. *Bustamonte*, 412 U.S. 218 (1973) 20

United States v. *Adelman*, 107 F.2d 497 (2d Cir. 1939) 17

United States v. *Bennett*, 409 F.2d 888 (2d Cir.), *cert. denied*, 396 U.S. 852 (1969) 25

United States v. *Birnbaum*, 373 F.2d 250 (2d Cir.), *cert. denied*, 389 U.S. 837 (1967) 34

United States v. *Bolin*, 514 F.2d 554 (7th Cir. 1975) 21

United States v. *Bujese*, 378 F.2d 719 (2d Cir.), *remanded on other grounds*, 392 U.S. 297 (1967), *re-aff'd*, 434 F.2d 46 (2d Cir. 1970), *cert. denied*, 401 U.S. 978 (1971) 27

PAGE

United States v. *Callahan*, 439 F.2d 852 (2d Cir.), *cert. denied*, 404 U.S. 826 (1971) 17, 22

United States v. *Campanile*, 516 F.2d 288 (2d Cir. 1975) 26

United States v. *Candella*, 469 F.2d 173 (2d Cir. 1972) 20, 22

United States v. *Cannon* 472, F.2d 144 (9th Cir. 1973) 26

United States v. *Chason*, 451 F.2d 301 (2d Cir. 1971), *cert. denied*, 405 U.S. 1016 (1972) 30

United States v. *Curiale*, 414 F.2d 744 (2d Cir. 1969), *cert. denied*, 396 U.S. 959 (1970) 17, 19

United States v. *DeAngelis*, 490 F.2d 1004 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974) 31

United States v. *DeLaMotte*, 434 F.2d 289 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971) 30

United States v. *DeMarco*, 488 F.2d 828 (2d Cir. 1973) 22

United States v. *Esquer*, 459 F.2d 431 (7th Cir. 1972), *cert. denied*, 414 U.S. 1006 (1973) 33

United States v. *Fernandez*, 456 F.2d 638 (2d Cir. 1972) 19, 20, 21

United States v. *Fisher*, 455 F.2d 1101 (2d Cir. 1972) 27

United States v. *Gorman*, 355 F.2d 151 (2d Cir. 1965), *cert. denied*, 384 U.S. 1024 (1966) 18

United States v. *Gregory*, 204 F. Supp. 884 (S.D.N.Y. 1962) 19

PAGE

United States v. *Hamilton*, 420 F.2d 1096 (7th Cir. 1970) 34

United States v. *Hughes*, 441 F.2d 12 (5th Cir.), *cert. denied*, 404 U.S. 849 (1971) 27

United States v. *Kahaner*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963) 30, 34

United States v. *Kohn*, 365 F. Supp. 1031 (E.D.N.Y. 1973), *aff'd on opinion below*, 495 F.2d 763 (2d Cir.), *cert. denied*, 419 U.S. 965 (1974) 19

United States v. *LaVecchia*, 513 F.2d 1210 (2d Cir. 1975) 36

United States v. *Lotsoff*, 394 F.2d 619 (2d Cir. 1968) 33

United States ex rel. Lundergan v. *McMann*, 417 F.2d 519 (2d Cir. 1969) 19, 20

United States v. *Marotta*, 326 F. Supp. 377 (S.D.N.Y. 1971), *aff'd without opinion*, 456 F.2d 1336 (2d Cir. 1972) 21

United States v. *Miley*, 513 F.2d 1191 (2d Cir. 1975) 16, 17, 20, 22, 23

United States v. *Oliver*, Slip Op. 2d Cir., decided June 17, 1975 19

United States v. *Pentado*, 463 F.2d 355 (5th Cir.), *cert. denied*, 409 U.S. 1079 (1972) 25, 26

United States v. *Rathburn*, 414 F.2d 767 (2d Cir. 1969), *cert. denied*, 399 U.S. 912 (1970) 27

United States v. *Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970) 24, 27, 28

United States v. *Ricketson*, 498 F.2d 367 (7th Cir.), *cert. denied*, 419 U.S. 965 (1974) 27

PAGE

United States v. *Roche*, 36 F.R.D. 413 (D. Conn. 1965) 18

United States v. *Rothberg*, 460 F.2d 223 (2d Cir. 1972) 22

United States v. *Thompson*, 495 F.2d 165 (D.C. Cir. 1974) 27

United States v. *Thompson*, 356 F.2d 216 (2d Cir. 1965), *cert. denied* 384 U.S. 964 (1966) 18

United States v. *Tourine*, 428 F.2d 865 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971) .. 30, 31, 34, 35

United States v. *Tramunti*, 513 F.2d 1087 (2d Cir. 1975) 30

United States v. *Trantham*, 448 F.2d 1036 (D.C. Cir. 1971) 27

United States v. *Vosper*, 493 F.2d 433 (5th Cir. 1974) 27

Wangrow v. *United States*, 399 F.2d 106 (8th Cir.), *cert. denied*, 393 U.S. 933 (1968) 27

TABLE OF AUTHORITIES

Advisory Committee Note, Fed. R. Evid. ¶ 2401 ... 24

Rule 401 of the Federal Rules of Evidence 24

Rule 52(a) of the Federal Rules of Criminal Procedure 30

1 Wigmore, Evidence §§ 28, 29 (3d ed. 1940) 24

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1218

UNITED STATES OF AMERICA,

Appellee,

—v.—

RICHARD WIENER,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Richard Wiener appeals from a judgment of conviction entered on June 3, 1975 in the United States District Court for the Southern District of New York, after a three and one-half day trial before the Honorable Edmund L. Palmieri, United States District Judge, and a jury.

Indictment 75 Cr. 368, filed April 11, 1975, charged Wiener and Stephen Silverman in two counts with violations of the narcotics laws. Count One charged a conspiracy to distribute controlled substances in violation of Title 21, United States Code, Section 846, Count Two charged both defendants with possession of hashish with

the intent to distribute it, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B).*

A one and one-half day hearing on Wiener's motions to suppress certain items of tangible evidence and certain statements immediately preceded the trial. At the end of the hearing on April 15, 1975 the trial judge found the items to have been lawfully seized, but suppressed the statements.

Trial commenced on April 15, 1975 against Wiener.** On April 18, 1975 the jury found Wiener guilty on Counts One and Two as charged, and, on Count Three, guilty of the lesser included misdemeanor. Title 21, United States Code, Section 844(a).

On June 3, 1975 Wiener was sentenced to three concurrent terms of imprisonment: two years on Count One; two years on Count Two; and six months on Count Three; to be followed by two years special parole. In addition he was fined $2,500 on Count One and $2,500 on Count Two for a total committed fine of $5,000. Wiener is presently free on bail pending appeal.

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* This Indictment superceded Indictment 75 Cr. 125, filed February 4, 1975, which contained three similar counts but charged a lesser amount of hashish in Count Two.

** On March 4, 1975 co-defendant Silverman pleaded guilty to Count One, the conspiracy count, of Indictment 75 Cr. 125. On April 25, 1975, pursuant to the provisions of Title 18, United States Code, Section 5010(d), as extended by Section 4209, Silverman was sentenced to five years imprisonment, with execution of all but two months suspended, and was placed on probation for a period of one year. Title 18, United States Code, Section 3651. A two year special parole term was also imposed.

Statement of Facts

The Trial

The Government's Case

In the Fall of 1974, Richard Wiener was a part-owner in two Manhattan eastside Restaurants, "Little John's" and "Paxtons" (Tr. 153).* Stephen Silverman ** was a salesman for Ritter Food Corporation, located in New Jersey (Tr. 152). Wiener lived in Apartment 2C, at 215 East 80th Street, an apartment building on the north-side of the street between Second and Third Avenue, Manhattan. Silverman lived in Springfield, New Jersey. They saw each other, in the course of their respective businesses, once or twice a week (Tr. 153-55).

Silverman testified that toward the end of September 1974, Wiener told Silverman that he had 800 pounds of hashish available at $800 a pound which he didn't want to sell in quantities of less than 14 pounds (Tr. 156). A couple of days later in Wiener's apartment Wiener showed Silverman a two pound wheel of the hashish (Tr. 157). Silverman smoked some of it and asked if he could take a piece to show to his potential buyers. Wiener declined, stating it was a sample which had been dropped off for him and that he was selling in lots (Tr. 158). Wiener had previously informed Silverman that he would only

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* "Tr." refers to the trial transcript.

** There are two Silvermans in this case. Larry Silverman, no relation, crops up less frequently and far less importantly. To keep their identities clear, Stephen will be referred to hereafter as "Silverman;" Larry, by his full name.

Silverman, after his plea of guilty to Count One, testified for the Government at the trial of Wiener.

deal directly with him, and that if Silverman made a sale he was to contact Wiener and arrange where and when Silverman would pick up the hashish for his buyer (Tr. 159).

A few weeks later, Silverman testified, on two separate occasions he found customers for small quantities of the hashish (ten pounds in total). In each instance, at Wiener's direction, Silverman brought the buyer's cash to Wiener's apartment where Wiener weighed the hashish, packaged it for Silverman, and took the money (Tr. 160-63). On the second occasion when Silverman arrived, the hashish had not. Silverman testified that it was delivered a few minutes later by a person Wiener did not give him an opportunity to see (Tr. 162-63).

On October 28, 1974, Silverman was contacted by one of his customers, Larry Silverman,* who reported that a friend of his had a buyer for all the hashish he could get. Silverman queried Wiener who indicated that there were 40 pounds left (Tr. 164-65).

Negotiations bounded back and forth between the buyer at one end and Wiener, the source, at the other, with Silverman, Larry Silverman and his friend serving as intermediaries. Silverman testified that the main issue was whether the sale would be made in two trips, as Wiener wanted, or in one as the buyer wanted. Wiener prevailed at the time (Tr. 165-66). A price of $650 a pound, $26,000 for the 40 pounds, was fixed (Tr. 165).**

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* See Note, p. 3, *supra*.

** Wiener was selling to Silverman at $550 a pound. Silverman was to pocket the $100 a pound difference as his profit (Tr. 156-57).

The deal was to be consummated on October 30, 1974, at 6 p.m. on the corner of Second Avenue and 80th Street, less than a block from Wiener's apartment. Wiener and Silverman arranged to meet in Wiener's apartment shortly before the appointed hour (Tr. 166).

On the day of the transaction, October 30, 1974, Wiener went to Korvette's (Olin's) Rent-A-Car, between First and Second Avenues on East 76th Street in Manhattan, and rented a 1974 Chevrolet Nova, License Number 202-ZDG at 4:38 p.m. (Tr. 283-84).*

An hour and a half later Silverman arrived at Wiener's apartment and saw Wiener packaging the 40 pounds of hashish in four plastic garbage bags, which he then placed in four shopping bags (Tr. 168).

Wiener took Silverman to the apartment windows overlooking 81st Street and pointed out the rented car parked there. Silverman then watched Wiener carry the hashish to that car and place two bags in the trunk and two bags in the back seat (Tr. 169-70).

When he finally returned to the apartment Wiener gave Silverman the trunk key only and explained the "two trip" requirement. Silverman was to get half the money from the buyer, $13,000, deliver half the hashish to the buyer, and bring the money to the apartment where Wiener would give him the key to the interior of the car. Silverman was to then repeat the pattern with the remaining $13,000 and 20 pounds. Wiener explained that the two trips were necessary because he didn't want to

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* This was established through the testimony of Daniel Weinhart, an employee of Olin's, and documentary evidence (Government Trial Exhibit 13).

take a chance of getting ripped off in case anything went wrong (Tr. 170).

Silverman left the apartment and met Larry Silverman, who had accompanied him to New York City from New Jersey, on the corner of 80th Street and Second Avenue. There, Silverman testified, they waited for Larry Silverman's friend and the buyer of the 40 pounds of hashish (Tr. 170). Unknown to either at that time, the buyer, Steven Moran, was an undercover Agent of the Drug Enforcement Agency. In addition to Moran, several DEA agents were in the vicinity on surveillance duty.

A little after 6 p.m., Agent Moran and an informant arrived by car and parked at the corner of Second Avenue and 80th Street. Agents Michael Powers, James Greenan and Michael O'Connor, among others, observed as Moran and the informant met with the two Silvermans on the street corner across from the car. Then, Moran and Silverman left Larry Silverman and the informant to stand on the corner and returned to the car (Tr. 55, 113-14). Silverman asked to see Moran's money (Tr. 26, 171). Moran showed him over $26,000 in government funds. Silverman told him about the two-trip requirement; Moran said he thought that was too risky and asked for one trip. Silverman told Moran he would have to check and asked him to wait in the car (Tr. 26-27, 172).

Silverman headed directly for Wiener's apartment at 215 East 80th Street, followed by Agents Powers, Greenan and O'Connor. Inside, Silverman testified, he told Wiener that the buyer had all the money and that in his opinion it would be better to do the sale in "one-shot" rather than risk two trips. Wiener reluctantly agreed. He asked where the deal was to go down and

for a description of the buyer and the buyer's car. Silverman complied and Wiener said he was going to go down to see if everything went smoothly. Wiener gave Silverman the interior key to the car containing the hashish, so that Silverman could drive the car to where Moran was waiting. They left the apartment together (Tr. 172-73). Meanwhile, Agents Powers and Greenan had ascertained from the doorman that Silverman had gone to Wiener's apartment and were heading there when Wiener and Silverman came down the hall on their way out.

As Powers came alongside, he overheard Wiener ask Silverman where "the guy" was and Silverman respond, "He's on the corner of 80th Street and Second" (Tr. 57-58). Once past Silverman and Wiener, Powers turned and followed them to the foyer of the apartment building. There, engaging the doorman in conversation, was O'Connor, who had stayed behind at the entrance. As Wiener and Silverman reached the entrance, Silverman, with both keys in his hands, asked Wiener to identify the ignition key to the car (Tr. 174). Powers and O'Connor observed Wiener take the keys, put them together on a key ring and hand them back to Silverman (Tr. 58, 116). O'Connor heard Wiener say to Silverman "I'll go watch" (Tr. 116).

Wiener turned and walked east on 80th Street toward Second Avenue. Silverman, under surveillance by Powers and O'Connor, walked west on 80th, around the block to the rental car acquired earlier by Wiener, which was parked on East 81st Street. He unlocked the car and drove west to Third Avenue and turned north. O'Connor and Powers walked to the corner of 81st Street and Second Avenue where they saw Wiener standing. They

then saw Silverman drive south down Second Avenue, stop, get out and talk briefly with Wiener (Tr. 60, 118). Silverman then returned to the rental car and drove to the corner of Second Avenue and 80th Street where Moran waited with the money in his car. Wiener, watching Silverman, positioned himself midway between 80th and 81st Streets, where he leaned on a parked car and directed his attention to the corner where the transaction was to occur (Tr. 119-20).

Silverman opened the trunk of the car and Moran examined the hashish in the shopping bags. He then raised the trunk of his car, the pre-arranged arrest signal. The agents arrested Silverman and Wiener and seized the 40 pounds of hashish (Tr. 60, 120).*

Agents Powers and Greenan subsequently went to Wiener's apartment where Powers conducted a cursory search with Wiener's consent ** and seized a quantity of small packages of marihuana,*** a large quantity of marihuana and hashish smoking paraphernalia (Tr. 63-66) and a loaded Pietro Beretta pistol, all in a burlap bag (Tr. 62-66).

The Defense Case

Ronald Goldstein, Wiener's business partner, testified that both he and Wiener had occasion to work into the early morning hours at "Little John's" and "Paxtons,"

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* Other agents on the scene arrested Larry Silverman. The informant left the scene. Larry Silverman was released the next day without charges being brought.

** See, Suppression Hearing, *infra*.

*** It is this marihuana which is the subject of Count Three of the Indictment.

and that the safe where the receipts were stored overnight had been robbed once, two years ago. Total daily receipts for one of the restaurants averaged $800 to $1,000 and from $1,500 to $2,000 on an exceptionally good evening and on rare occasions, according to Goldstein, he and Wiener would take a portion of those receipts home rather than leave them in the safe overnight (Tr. 306). Goldstein said he maintained three registered rifles on his premises for the protection of those proceeds (Tr. 294). On cross-examination Goldstein said he hunted with his rifles; had no pistols in his home; had never seen Wiener's pistol; and that the first and last time he discussed the matter of guns with Wiener was when they first went into business seven or eight years ago (Tr. 301-02).

Agent Greenan testified that Wiener voluntarily consented to the search by Agent Powers of Wiener's apartment (Tr. 307, 310).

Julio Arroyo, the doorman on duty at 215 E. 80th Street on October 30, 1975, testified that Agents Powers, Greenan and O'Connor followed Silverman into the apartment building that evening and that O'Connor waited at the door with him while the other two headed for Wiener's apartment. He testified that he did not see Agent Powers in the lobby when Silverman and Wiener came out, that he did not observe O'Connor turn to see them leave, that he did not see an exchange of keys, and that he did not hear any conversation between them (Tr. 361).

The Government's Rebuttal Case

The Government recalled Agent Powers who testified that he was standing in a dark place in the lobby about ten feet behind Arroyo and O'Connor when he saw Wiener and Silverman pass the keys back and forth (Tr. 395-96).

The Suppression Hearing

The Government's Case

Agents Powers and O'Connor testified essentially as they later testified at trial with respect to their observations up to the time of Wiener's arrest (Hr. 6-12, 67-70).*

At the pre-arranged arrest signal O'Connor moved alone to Wiener with his gun drawn (Hr. 38). He told him he was under arrest, handcuffed him, searched him, put his gun away (Hr. 40), and advised him fully of his rights as outlined on DEA Form 13A (Hr. 12-13, 40).** They then walked to the corner of Second Avenue and 80th Street and joined the other agents who had arrested Silverman and Larry Silverman (Hr. 13, 40-44). At the corner a large crowd had gathered and O'Connor, left with the prisoners while Powers went to get Agent Greenan (Hr. 54, 71, 73), again drew his gun (Hr. 41). When Powers returned in a few minutes, O'Connor left the scene with Larry Silverman and the forty pounds of hashish (Hr. 42). Neither Powers nor Greenan had their guns drawn at that time (Hr. 102, 160). Wiener and Silverman were then placed in the rear of a DEA car, with Greenan driving and Powers in the front passenger seat, and they proceeded toward DEA headquarters. Powers advised Wiener and Silverman of their "standard Miranda warnings" (Hr. 55). Thereafter, according to Powers and Greenan, as the car was heading west to Fifth Avenue, Wiener said he would like to go back to his apartment to check the security lock and, if his

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* "Hr." refers to the hearing transcript.

** DEA Form 13A contains a full statement of rights pursuant to *Miranda* v. *Arizona*, 384 U.S. 436 (1966). See, Government Hearing Exhibit 13.

wife had come home in his absence, to tell her what had happened to him (Hr. 55, 74-75, 90, 103). Powers, mentally observing that such a visit might provide an opportunity to search the apartment, agreed to return to the apartment (Hr. 56, 249). At some time after O'Conner handcuffed Wiener on the street and before Powers and Greenan turned the car back to 215 East 80th Street, the handcuffs on Wiener had been removed. Wiener and Silverman were handcuffed together with a single pair of handcuffs in the car (Hr. 56, 73, 75). All four of the men went into Wiener's apartment building. At Wiener's request, a jacket was placed over the handcuff links between Silverman and himself to avoid embarrassment to him (Hr. 56). Wiener knocked on his apartment door and his wife opened it. They entered and the agents explained to her that they were federal agents and that Wiener was under arrest. Wiener also explained the situation to his wife (Hr. 56-57). He was calm and collected (Hr. 76).

Wiener and Silverman were seated on a couch, and Wiener was told to give his wife his personal property inasmuch as it would be taken from him at the jail. Then Powers asked Wiener, "Do you have any narcotics in the apartment?" Wiener replied, "If you find any, you can have them." Powers said, "Does that mean you are giving us your consent to search the apartment?" Wiener repeated, "If you can find any, you can have them" (Hr. 57, 249). Greenan gave a similar account of the conversation (Hr. 77).

Powers then asked Wiener's wife to accompany him while he conducted a cursory look around the apartment (Hr. 58-59, 91). They proceeded first to the kitchen, to a bedroom, through the living room and then into another bedroom where he found a burlap bag in a closet. He opened the bag and found a quantity of small packages containing marihuana, a loaded pistol and a

quantity of hashish and marihuana smoking paraphernalia. The bag and its contents were seized (Hr. 59).

In response to Mrs. Wiener's query the agents told her that Wiener would first be taken to DEA headquarters for processing and then to the Federal House of Detention for overnight lodging, and that he would appear before the Magistrate in the United States Courthouse in Foley Square the next morning (Hr. 60).

During the entire episode, from before the time Wiener was placed in the car with Silverman, no guns were exhibited by Powers or Greenan (Hr. 61). O'Connor testified that the DEA had printed consent forms for searches of apartments, but that it was not required that agents carry them and it was not customary to take such forms to a planned arrest unless an agent knows that he may be going to an apartment (Hr. 45). Powers and Greenan testified that they did not have consent to search forms with them (Hr. 77, 106). Wiener said nothing as Powers left the living room to commence his search, and at no time in the apartment did Wiener object to Power's actions (Hr. 86-87). The agents were in the apartment from 5 to 15 minutes. The "search" consumed only a portion of that time (Hr. 59, 93).*

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* The Government's case continued with Greenan's testimony that at DEA headquarters Wiener made a number of statements: that he didn't know the people he had been arrested with; that he had been on the street only to buy a bagel (Hr. 95). These statements were suppressed by the trial judge after an attorney testified that he had gone to DEA headquarters the night of the arrest and been told the defendant had already been taken to the Federal House of Detention. The DEA night duty supervisor testified that he had looked for Wiener and could not find him at DEA headquarters when the attorney arrived. The trial judge credited the agent's testimony but held that because of time factors, the defendant must have still been in the building somewhere.

The Defense Case

Wiener testified and denied that he had asked to return to his apartment; denied that there was a security lock on his door; denied that Powers had asked him if he had his consent to search the apartment, in any manner whatsoever. He denied that he had "ever throughout the whole proceedings," been advised of his right to remain silent, or of any other right (Hr. 134-38).

However, on cross-examination Wiener admitted that his apartment door did have a double lock (Hr. 151-52). He also testified that he was 32 years old; that he had been in the restaurant business as a manager since his early twenties (Hr. 154), and as an owner for at least seven years (Hr. 152); that he attended Bucknell University for three years (Hr. 155); that he knew a citizen in the United States has a constitutional right to remain silent (Hr. 156); that he knew he had a right to an attorney (Hr. 173); and that he "probably would have been aware under different circumstances" that he had a right not to permit his apartment to be searched without a warrant (Hr. 163-64).

Wiener first said that the agents had guns on him when they said they were returning to his apartment to search, and then admitted they didn't (Hr. 156, 161). He said the agents were "shoving and hitting" him around, and physically abused him (Hr. 156-57), and then said that he was shoved once after they were in the car (Hr. 159-60).

He never asked if the agents had a search warrant and never told them that he didn't want his apartment searched (Hr. 164). Moreover, he recalled saying to his wife in the presence of the agents, "Don't worry, there's nothing here to worry about. There is nothing

here that they can find" (Hr. 165). He testified that Powers was "shouting, sort of abusive," but said that Greenan was kind enough to tell Mrs. Wiener where he, Wiener, would be taken (Hr. 166-67).

Joyce Wiener, the appellant's wife, testified that the agent announced as they entered the apartment that they were going to search it and if they found anything incriminating they would arrest her too. She corroborated her husband's testimony that the agents never mentioned a consent to search the apartment. She said that Powers asked her to accompany him as he searched so that she couldn't claim later that something was stolen. While in the first bedroom, she testified, Powers said ". . . I haven't seen my wife in all this time, and why don't you just do everybody a favor and since you don't sleep with your husband anyway, why don't you sleep with me? . . . You know your husband could just walk away from all this." She said she then walked out of the room and complained to Greenan about Powers (Hr. 181) and did not return to that bedroom (Hr. 191). She said she went into the second bedroom with him and stayed for about two minutes and that he, again, became "extremely abusive" (Hr. 192). She left and he came out and got Wiener and Silverman to return to the bedroom with him (Hr. 192). She testified that nothing in the apartment was disturbed by the agents and that the search had taken 45 minutes. All she saw Powers do, she said, was open two suitcases and leaf through some clothes piled on a couch (Hr. 195).

Wiener then returned to the witness stand and claimed that he saw the agent throwing things around on the floor of the closet and dumping the contents of one bag into another. He further testified that the portion of the search he witnessed took just a few minutes (Hr. 202).

Government Rebuttal Case

Greenan was recalled and testified that Powers was in the first bedroom a minute or two minutes and that Mrs. Wiener was there with him the entire time. Mrs. Wiener said nothing to him about Power's behavior (Hr. 237-243) when they emerged, nor at any time. He testified that Silverman and Wiener were with him in the living room on the couch during the entire stay in the apartment.

Powers then testified that he had not touched Wiener while they were in the car, although he had probably assisted him in getting into the car (Hr. 247). He stated that he might very well have said that if he found any drugs in the apartment he would arrest Mrs. Wiener, too, because it is a standard statement he makes in such circumstances (Hr. 251). Powers denied saying anything to Mrs. Wiener about her sex life, or his. Powers said his tone and style were very "low key." He testified that there were no problems, and from the time they walked in the conversation was normal (Hr. 253). Powers said he had been a DEA agent for six and a half years, a group supervisor for two years, and prior to that a Marine Corps captain. He testified that during his DEA experience, he had participated in 50 to 75 arrests which involved his presence in dwellings, and that women were in those dwellings in the majority of instances (Hr. 259). He testified that no allegations like those made by Mrs. Wiener had ever been made with respect to him before.

ARGUMENT

POINT I

The trial court correctly found that Wiener consented to the search of his apartment.

After an extensive hearing as to the legality of the search which resulted in the seizure of the marihuana, the smoking paraphernalia and the loaded gun in Wiener's apartment, Judge Palmieri ruled that Agent Powers "was acting legally and properly and not as a result of any deceit, fraud, abuse or illegality" (Hr. 309-11). On the basis of all the facts, disputed and undisputed, he concluded that Wiener initiated the return to and entry into his apartment, and that the following exchange between Powers and Wiener:

> "Do you have any narcotics in the apartment?"
> "If you find any, you can have them."
> "Does that mean you are giving us your consent to search the apartment?"
> "If you can find any, you can have them." *

constituted a consent, freely and voluntarily given.

In this case there can be no serious question as to the trial judge's resolution of the disputed issues of fact. The credibility of the witnesses was a matter for him alone to resolve, see, e.g., *United States* v. *Miley*, 513 F.2d 1191, 1201 (2d Cir. 1975); *United States* v. *Fernandez*, 456 F.2d 638, 640 (2d Cir. 1972), and there was a substantial basis for his rejection of the testimony of appellant and his wife. Wiener's penchant for exaggerated accusation is clear from the record of his cross-examination

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* Hr. at 57.

(Hr. 144-73). His wife's story was not only inherently suspect because of her interest, but her account of the sexual advances by a DEA Group Supervisor in an arrest situation with others present defied belief. Judge Palmieri was clearly justified in accepting the testimony of Agents Powers and Greenan as to the colloquy between Powers and Wiener.*

The only remaining question is whether the trial judge was correct in concluding under the totality of the circumstances that Wiener's communication constituted a free and voluntary consent. This question, too, however, is primarily one of fact, to be determined by the trial judge, see, e.g., *United States* v. *Callahan*, 439 F.2d 852, 861 (2d Cir.), *cert. denied*, 404 U.S. 826 (1971), whose judgment is only reluctantly overturned, *cf. United States* v. *Miley*, *supra*, 513 F.2d at 1201, unless clearly erroneous, see, e.g., *United States* v. *Curiale*, 414 F.2d 744, 747-48 (2d Cir. 1969), *cert. denied*, 396 U.S. 959 (1970). The conclusion reached by Judge Palmieri is fully supported if not compelled by the evidence, despite appellant's protestations to the contrary.

At the threshold, Wiener contends that the words he used were equivocal and cannot be read as words of consent. If the agent had commenced his tour of the apartment after the first portion of the exchange, the question might be closer, although this Court has found consent communicated with similar language. *United States* v. *Adelman*, 107 F.2d 497, 498 (2d Cir. 1939). But here,

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* Although Wiener contends that their testimony could not be believed since he could not have requested to return to his apartment to secure it because it did not have a "security lock," he did admit at the hearing that his apartment door had a "double lock" (Hr. 151-52).

after the first exchange, the agent put the question directly to Wiener, "Does that mean you are giving us your consent to search the apartment?" This not only made clear to Wiener that the initial question about narcotics was more than rhetorical, it also put him on notice that the agent wanted to search his apartment and that he, Wiener, had the choice of consenting or not consenting. In this context, Wiener's reiteration of his earlier statement was, as the trial judge put it, tantamount to a "gracious invitation" which the agent accepted. The message to the agent was as explicit, indeed perhaps more explicit than in other cases affirmed by this Court. See, e.g., *United States* v. *Thompson*, 356 F.2d 216, 219 (2d Cir. 1965), *cert. denied*, 384 U.S. 964 (1966) (In response to a request to look around, Thompson said, "Go ahead,"); *United States* v. *Gorman*, 355 F.2d 151, 158 (2d Cir. 1965), *cert. denied*, 384 U.S. 1024 (1966) (In response to a question as to whether Roche had any objection to agents looking in his luggage, he said, "Be my guest").*

Wiener's contention that his response to Powers was merely "smart-alecky" or false bravado is refuted both by the fact that he made it again after Powers made it crystal clear that he was seeking his *consent* to search the apartment, and by his remark to his wife that, "there's nothing here to worry about; there is nothing here that they can find" (Hr. 165). It is also controverted by the fact that after Powers commenced his search of the apartment, Wiener didn't protest. See, *United States* v. *Thompson*, *supra*, 356 F.2d at 220. He may well have believed, given his remark to his wife, that the agents

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* See also, *United States* v. *Roche*, 36 F.R.D. 413, 414 (D. Conn. 1965) and *Gorman* v. *United States*, 380 F.2d 158, 162 (1st Cir. 1967), for treatment of the same facts.

would never discover the marihuana, gun or smoking paraphernalia. See, e.g., *United States* v. *Curiale*, *supra*, 414 F.2d at 747.*

Wiener argues that even if his words constituted a consent, the Government failed to meet its burden of establishing by a preponderance of the evidence that the words of consent were freely, voluntarily spoken. See, e.g., *United States* v. *Oliver*, Slip op. at 4072, 2d Cir.,

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* *Channel* v. *United States*, 285 F.2d 217 (9th Cir. 1960); *Judd* v. *United States*, 190 F.2d 649 (D.C. Cir. 1951), and *United States* v. *Gregory*, 204 F. Supp. 8[illegible] (S.D.N.Y. 1962), cited by appellant for the proposition that language such as that used by Wiener was not an unequivocal consent, are distinguishable. Both in *Channel* and *Judd*, the defendants were in jail away from the place to be searched when the officials broached the subject after extensive interrogation. In *Channel*, the approach was oblique, "you probably have more stuff in your apartment." And when the defendant answered "I have nothing to hide, you can go there and see for yourself," that is precisely what the officers did, without Channel, and without even telling him of their intentions so that he would have an opportunity to object. In *Judd*, the defendant was arrested late at night, booked on an open charge, questioned for several hours and then taken alone to his home in handcuffs by four officers. In each of these cases the analysis of non-voluntariness was not based principally on the nature of the words in which "consent" was expressed but rather on the totality of circumstances. The nature of the consent and the totality of the circumstances are demonstrably different in the instant case.

The finding of no voluntary consent in *Gregory* was predicated upon a finding that the purported words of consent were never spoken. Here, Judge Palmieri found otherwise. *See, e.g., United States ex rel. Lundergan* v. *McMann*, 417 F.2d 519, 521 (2d Cir. 1969); *United States* v. *Kohn*, 365 F. Supp. 1031, 1034 (E.D.N.Y. 1973), *aff'd on opinion below*, 495 F.2d 763 (2d Cir. 1974), *cert. denied*, 419 U.S. 965 (1974).

Moreover in all three cases the arresting officers failed to indicate to the defendant that he could withhold his consent.

decided June 17, 1975; *United States* v. *Miley*, *supra*, 513 F.2d at 1201; *United States* v. *Fernandez*, *supra*, 456 F.2d at 640. As the trial judge found, the Government more than met that burden.

In *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226, 248-49 (1973), the Supreme Court suggested that among the factors which should be considered in assessing the voluntariness of a consent are duress or coercion, express or implied; advice of rights; the youth of the defendant, his education and intelligence.

There is no evidence, accepted as credible by the trial judge, that would raise the spectre of duress, coercion, or deceit in this case. To be sure, Wiener was under arrest at the time he gave his consent. But this Court has repeatedly held that the fact that a person is under arrest does not preclude a finding of voluntariness. See, e.g., *United States* v. *Miley*, *supra*, 513 F.2d at 1201-02; *United States* v. *Candella*, 469 F.2d 173, 175 (2d Cir. 1972); *United States ex rel. Lundergan* v. *McMann*, *supra*, 417 F.2d at 521. From the time when Agent O'Connor put his gun away on the corner of 80th Street and Second Avenue, Wiener was not subjected to any overbearing show of official force. There were but two agents with the two arrestees in the apartment when Wiener gave his consent. Watched quietly by Agent Greenan, Wiener and Silverman sat on the couch, handcuffed to each other by one wrist. It is clear that the handcuffs were used for minimum security, not to humiliate or to terrify Wiener and to, thereby, overbear his will. Indeed, the agents had assisted Wiener in covering up the links as they went through the apartment lobby to alleviate his expressed embarrassment. There were no raised voices; no abusive words; no items disturbed during the search, save for the contraband; no

threats.* Further, Wiener spoke his words at least half an hour after his arrest, diminishing appreciably whatever impact that event might have had upon him. See, e.g., *United States* v. *Fernandez*, *supra*, 456 F.2d at 640. Finally, Wiener's wife was present throughout the events in the apartment.

Wiener's contention that the agents employed deceit is frivolous. It is based solely on the testimony of Agent Powers that when Wiener asked to return to his apartment, Powers thought that it might provide an opportunity to search. This entirely predictable and professional thought on the part of a trained law enforcement officer hardly constitutes a ruse or any form of deceit.**

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* The fact that Powers probably said to Wiener's wife that "if he found any drugs in the apartment, she could be arrested too" is not at all like the threat made in *United States* v. *Bolin*, 514 F.2d 554 (7th Cir. 1975), upon which appellant relies. In *Bolin*, the perceived threat was "if the defendant didn't consent to the search, his girlfriend would be arrested." Id. at 560. In other words, the agents were bargaining with the defendant for his consent. Here, if anything, the threat that Mrs. Wiener would be arrested if drugs were found in the apartment would have the effect of discouraging Wiener's consent to any search.

Similarly, Power's initial question to Wiener is not like the threat or statement alleged in *United States* v. *Marotta*, 326 F. Supp. 377, 380 (S.D.N.Y. 1971), aff'd without opinion, 456 F.2d 1336 (2d Cir. 1972). There the defendant and his parents said the agent ordered the defendant to turn over any more guns in the apartment or run the risk of the arrest of his parents, if guns were found pursuant to a search. Unlike the demand in *Marotta*, Powers' question about narcotics was "just a question put to the defendant which could have been answered positively or negatively." Id. at 381. It did not place Wiener in a "damned if you do, damned if you don't" position.

** It is clear that agents could have obtained a search warrant in this instance and had no need to rely upon deceit. They had just arrested Wiener whom they had good reason to believe was

[Footnote continued on following page]

It is uncontested that Wiener was not given a written consent form to sign * and was not told in so many words that he had a right to refuse to permit a warrantless search. But this circumstance must be considered in light of the fact (1) that Wiener was twice warned of his *Miranda* rights before he asked to return to his apartment and (2) that the language used by Agent Powers when he asked for the consent was tantamount to telling Wiener that he had a right to say "no." In a similar situation, the First Circuit has noted,

> ". . . when the accused is directly asked whether he objects to the search, there must be at least some suggestion that his objection is significant or that the search waits upon his consent. When this is combined with a warning of his right to

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Steven Silverman's source in a transaction involving a $26,000 sale of 40 pounds of hashish. Silverman had gone to Wiener's apartment in the thick of the transaction. These facts alone, plus other facts which led to Wiener's arrest, provided the agents with probable cause to believe there would be evidence of the crime in the apartment.

* Appellant asserts that this absence of a written consent is a significant factor in the "totality of the circumstances." This is a wholly frivolous argument. Agents Powers and Greenan both testified that they did not have consent forms with them. In a similar situation, this Court has not attached any significance to that circumstance, *United States* v. *Miley, supra*, 513 F.2d at 1200, and indeed, has credited consents without written forms in numerous cases. *United States* v. *DeMarco*, 488 F.2d 828 (2d Cir. 1973); *United States* v. *Candella, supra; United States* v. *Rothberg*, 460 F.2d 223 (2d Cir. 1972); *United States* v. *Callahan, supra.*

Wiener's strained argument and analogy to cases where IRS agents have failed to follow publicly announced rules and regulations of that agency, overlook the simple fact that in this case the only evidence with respect to an intra-agency requirement of consent forms is Agent O'Connor's testimony, and he said they were not required (Hr. 45).

> be silent, and his right to counsel, which would seem in the circumstances to put him on notice that he can refuse to cooperate, we think it fair to infer that his purported consent is voluntary." *Gorman* v. *United States*, *supra*, 380 F.2d at 163-64.

Here, when Wiener was asked directly if he "consented" to a search of his apartment, he was put on notice that the search depended upon his consent. Pertinent also is Wiener's background. He was not a poor ignorant defendant without mental, emotional and educational resources, who could not be expected to understand the import of Power's question. Wiener himself testified that he was 32, a successful restauranteur, and an experienced manager. He said he attended college for three years and generally understood his right not to incriminate himself and his right not to permit a search without a warrant.

Indeed, as this Court commented in *Miley*, this is a "typical case of a knowledgable suspect extending consent to officers under circumstances where they could readily have obtained a search warrant and then attempting to have the evidence suppressed on the ground that the consent was not voluntary." 513 F.2d at 1202. On the basis of all the facts and circumstances, the trial judge was correct when he found that Wiener freely and voluntarily consented to the search.*

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* Even if this Court should find that the trial judge's determination was in error, the result should be no more than a reversal of the judgment of conviction on Count Three, the charge involving the marihuana seized from the apartment during the search. The admission of the smoking paraphernalia and the gun was at worst harmless error. The smoking paraphernalia bore

[Footnote continued on following page]

POINT II

The loaded gun found in Wiener's apartment was relevant to the issues in the case and created no unfair prejudice.

Wiener argues that the admission into evidence of a loaded pistol found in his apartment constitutes reversible error. He contends that since he was arrested in the street on drug charges and the gun was found in his apartment, the weapon was not used in the crime charged and consequently was irrelevant. The principles of evidence are not so restrictive.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401 of the Federal Rules of Evidence. Put briefly, the question to be asked is: "Does the item of evidence tend to prove the matter sought to be proved." Advisory Committee Note, Fed. R. Evid. ¶ 2401. The Rule is but a statement of the principles in effect when this case was tried. See, e.g., 1 Wigmore §§ 28, 29 (3d ed. 1940). Thus, the concept of relevancy does not require that the gun "produce persuasion by its sole and intrinsic force, but merely . . . be worth consideration by the jury." Id. § 29. See, e.g., *United States* v. *Ravich*, 421 F.2d 1196, 1203 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970).

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little, if any, relation to Counts One and Two and may have persuaded the jury that the marihuana charged in Count Three was for personal use only. Indeed, it is clear from the conviction on the lesser included offense of possession in Count Three that the jury did not use the smoking paraphernalia to draw broad inferences concerning Wiener's participation in drug distribution. The impact of the gun on the jury is discussed in Point II, *infra*, pp. 28-29.

In this case, the Government contended that Wiener conspired with Silverman to distribute hashish, that Wiener with Silverman possessed hashish with the intent to distribute it, and that Wiener possessed marihuana with the intent to distribute it. Wiener was arrested on the street a half a block from where the 40 pound transaction aborted. Although he was not seen by any of the agents in actual possession of the hashish, the evidence indicated that Wiener was the source for the hashish and that the focal point of the conspiracy was in Wiener's apartment. It was there where Wiener discussed the availability of 800 pounds of hashish with Silverman; it was there where Wiener collected the money and dispensed the hashish in his prior dealings with Silverman; it was there where quantities of hashish were delivered to Wiener; it was there where the preparations for the 40 pound deal were undertaken; and, it was to there that Silverman rushed when Moran changed the terms of the purchase and insisted on a single trip. Silverman's testimony also gave rise to the inference that during a period of a month, Wiener had disposed of all but 40 of the original 800 pounds of hashish in the same fashion. The jury could therefore infer that half a million dollars in illicit cash went through Wiener's apartment during October of 1974.

Experience has established beyond question that weapons are accouterments of the illicit drug trade, necessary to protect vast amounts of cash and valuable drugs, not only or even particularly against law enforcement agents, but against unsavory predators in the same business. See, e.g., *United States* v. *Pentado*, 463 F.2d 355, 360 (5th Cir.), *cert. denied*, 409 U.S. 1079 (1972); *cf. United States* v. *Bennett*, 409 F.2d 888, 895 (2d Cir.), *cert. denied*, 396 U.S. 852 (1969).

Given the importance of weapons in the drug trade and the evidentiary background of this case, the jury was

entitled to consider the fact that Wiener had a loaded gun concealed in his apartment to draw legitimate inferences about his participation in the conspiracy charged. In order for these inferences to be legitimate, it was not necessary for Wiener to have carried the gun with him to the street. In the first place, the gun was some proof that the marihuana found with it in the apartment was for distribution, not for personal use. See, *United States* v. *Cannon*, 472 F.2d 144 (9th Cir. 1973). But more importantly, the gun tended to corroborate Silverman's testimony that Wiener was dealing out of his apartment; that Wiener was his source. It tended to make it more probable than not that Wiener's rental of the car was for illicit purposes; that Silverman's visit to Wiener in the middle of the transaction was not accidental; that Wiener's venture out to the street with Silverman and the snatches of conversation overheard by the agents were not the actions and words of an innocent bystander. "The weapon[s] had obvious probative value toward showing that the defendant[s] took the natural precautions that might be expected when goods are sold for a large amount of cash." *United States* v. *Pentado*, *supra*, 463 F.2d at 360.* See, e.g., *United States* v. *Campanile*, 516

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* *Pentado* refutes Wiener's contention that if guns are probative at all, they are so only in "hard drug" cases. *Pentado* was a heroin case, however the key fact underlying the Court's reasoning was not the kind of drug, but rather the amount of money involved in the transaction.

Appellant cites *Moody* v. *United States*, 376 F.2d 525 (9th Cir. 1967), which is distinguishable both from *Pentado* and from the facts in this case. In *Moody*, the gun was found in a glove compartment of a car carrying heroin. It was admitted against Moody who neither drove the car nor was anywhere near it when it was stopped and searched. Moreover, unlike here, the prosecutor argued in summation that the gun established the defendant's criminal character. Finally, the only evidence against Moody was the uncorroborated testimony of a single accomplice.

F.2d 288, 292 (2d Cir. 1975); *United States* v. *Ricketson*, 498 F.2d 367, 375 (7th Cir.), *cert. denied*, 419 U.S. 965 (1974); *Wangrow* v. *United States*, 399 F.2d 106, 115 (8th Cir.), *cert. denied*, 393 U.S. 933 (1968); *McClard* v. *United States*, 386 F.2d 495, 501 (8th Cir. 1967), *cert. denied*, 393 U.S. 866 (1968).*

Wiener further argues that even if the gun was relevant, it was inadmissible because of its prejudicial impact. The task of weighing possible unfair prejudice against probative value rests, however, in the sound discretion of the trial judge, see, e.g., *United States* v. *Fisher*, 455 F.2d 1101 (2d Cir. 1972), and his determination will rarely be disturbed on appeal. See, e.g., *United States* v.

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* The cases are legion where guns not directly connected with or used in the crime charged are permitted into evidence as probative of a wide range of material facts. See, e.g., *United States* v. *Thompson*, 495 F.2d 165 (D.C. Cir. 1974) (gave rise to inference of control over premises); *United States* v. *Vosper*, 493 F.2d 433 (5th Cir. 1974) (showed access to guns which could be used in a robbery); *United States* v. *Fisher*, 455 F.2d 1101 (2d Cir. 1972) (relevant to show preparation for crime and to corroborate Government witness); *United States* v. *Trantham*, 448 F.2d 1036 (D.C. Cir. 1971) (indicated defendants engaged in joint criminal enterprise); *United States* v. *Hughes*, 441 F.2d 12 (5th Cir.), *cert. denied*, 404 U.S. 849 (1971) (tended to serve as additional link to crime and corroborated testimony placing defendants on the scene); *United States* v. *Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970) (established opportunity to commit crime and thus identity; *United States* v. *Rathburn*, 414 F.2d 767 (2d Cir. 1969), *cert. denied*, 399 U.S. 912 (1970) (tended to establish conspiracy charged and to show interstate character of crime); *United States* v. *Bujese*, 378 F.2d 719 (2d Cir.), *remanded on other grounds*, 392 U.S. 297 (1967), *re-aff'd*, 434 F.2d 46 (2d Cir. 1970), *cert. denied*, 401 U.S. 978 (1971) (evidence of conspiracy charged); *Morton* v. *United States*, 183 F.2d 844 (D.C. Cir. 1950) (showed possession of appropriate means of committing crime charged).

Ravich, *supra* 421 F.2d at 1204. Judge Palmieri did not abuse his broad discretion in admitting the gun. By the time Judge Palmieri ruled, he had heard, during the suppression hearing, a major portion of the Government's evidence concerning the 40 pound transaction. He addressed himself to the question of the admissibility of the gun on several occasions prior to its offer and showed consummate understanding of appellant's arguments (Tr. 3-5, 44-49, 83-85).*

Moreover, the prejudicial impact of the gun was insubstantial. It was not used in any way to establish Wiener's criminal character. *Cf. United States* v. *Ravich*, *supra*, 421 F.2d at 1204. Indeed, the prosecutor's full remarks about the gun constituted a minute portion in an hour long summation and attempted to suggest to the jury only that they could infer from the gun and the other facts in the case that Wiener had the gun to protect his drug trafficking business which he was conducting out of his apartment (Tr. 448-449). Compare *Moody* v. *United States*, *supra*, 376 F.2d at 532.

Finally, even if the admission of the gun could be characterized as an abuse of the trial judge's discretion, the error here was harmless. With the testimony of Stephen Silverman, the Government's case was overwhelming. Although it is impossible to be certain about the

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* He did not, of course, have the benefit of Wiener's recently proffered estimate of one million hand guns in New York City (appellant's brief at 45). Wiener argues that this figure proves there could be no logical connection between drug dealing and hand guns. Such an argument could be countered, just as facetiously as it was made, with the proposition that the estimate proves the gun could have hardly inflamed the jury. On appellant's theory, one and a half of the jurors possessed hand guns of their own, and doubtless, one out of every eight of each of their New York City friends did as well.

jury's assessment of Silverman, there is one strong indication. Judge Palmieri charged the jury that they should acquit Wiener on Count Three if they disbelieved Silverman.* Since the jury did not acquit Wiener on Count Three, the inference that they did believe Silverman is inescapable. But, even apart from Silverman, the Government's case was substantial. The jury clearly believed the testimony of the agents with respect to the arrivals and departures of Silverman to and from Wiener's apartment. It was clear that the car which carried the hashish was rented by Wiener for one day on the afternoon of the ill-fated transaction. The gun, of course, was some additional evidence that Wiener was Silverman's source, but it only served to buttress what was evident from the conversation Agent Moran had with Silverman just prior to Silverman's visit to Wiener, from the conversations overheard by Powers and O'Connor, from their observation of the keys to the car passing back and forth, and from Wiener's presence on the street. Finally, in assessing the impact of the gun upon the jury, it should be noted that in spite of the fact that it was found with the small packages of marihuana in an apartment where the jury apparently believed a large quantity of hashish had been stashed, the jury, by convicting on the lesser included offense in Count Three, chose to conclude that the marihuana was possessed for personal use only. This would appear to indicate that the jurors were not swayed in any way by the gun.

All of these factors—the overwhelming evidence against Wiener, the cumulative evidentiary value of the gun, the lack of a strong defense, the apparent miminal impact of the gun on the jury—point to the conclusion

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* In the Government's view, this was more generous than the facts warranted.

that if the admission of the gun was error, it in no way contributed to the conviction and was harmless. See, e.g., *Harrington* v. *California*, 395 U.S. 250 (1969); *United States* v. *Chason*, 451 F.2d 301, 305 (2d Cir. 1971), *cert. denied*, 405 U.S. 1016 (1972) Rule 52(a) of the Federal Rules of Criminal Procedure.

POINT iii

There was no error in the trial judge's instructions to the jury.

Wiener claims that Judge Palmieri's marshaling of and references to the evidence in his charge was reversible error. This contention is without merit.

The right of a District Court Judge to summarize and to comment on the evidence in his instructions to the jury is settled in this circuit. *United States* v. *Tramunti*, 513 F.2d 1087, 1120 (2d Cir. 1975); *United States* v. *DeLaMotte*, 434 F.2d 289, 291-92 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971); *United States* v. *Tourine*, 428 F.2d 865, 869 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971); *United States* v. *Kahaner*, 317 F.2d 459, 479 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963). The function of such comments is

> ". . . to assist the jury in winnowing out the truth from the mass of evidence, much of it conflicting, and perhaps placed out of focus by different claims concerning its meaning and interpretation by the arguments of the parties."

United States v. *Tourine*, *supra*, 428 F.2d at 869. The judge may not, however, "impose his own opinions and conclusions as to facts on the jury and does not act as an advocate in advancing factual findings of his own." Id.

The test of whether a judge's summary of and references to the evidence is fair must be judged "in the context of the whole trial record, particularly the evidence and arguments of the parties." *United States* v. *DeAngelis*, 490 F.2d 1004, 1009 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974); *United States* v. *Tourine*, *supra*. Such an analysis in the instant case compels the conclusion that the trial judge's comments were fair and appropriate and that Wiener's attack is totally unwarranted.

Wiener charges that Judge Palmieri distorted his argument when he told the jury that if they thought Wiener was framed by Silverman with the aid of the agents, and that the agents had lied and used Silverman as an instrument, they should not hesitate to acquit (Tr. 500). There was, however, more than ample basis for the judge's characterization of defense counsel's theory. Wiener's counsel in summation said, speaking about Silverman's understanding and cooperation with the Government (Tr. 408-09):

> "Mr. Silverman is a criminal caught red-handed facing to be put away for many years and he is going to look to make the best possible deal for one person, Mr. Stephen Silverman.
>
> "If that means to falsely testify and to falsely accuse, he will do it, as he did, . . . Look at the relationship of the agents with Mr. Silverman . . . They have taken [him] over lock, stock and barrel. They have got him in the palms of their hands to squeeze him and to use him as they want. . . ."

And he continued, as to the agents (Tr. 414-15):

> ". . . They had some suspicion of Wiener, they had a statement of Stephen Silverman, they were ready to go, to shape, to mold, to take the details they would create, to make sure that they could nail Richard Wiener. . . ."

> "Indeed, they did shape that testimony so as to add the little sinkers here, the little sinkers there, the additional circumstances that they could walk into the Court with and tell this corroborates Stephen Silverman. . . ."
>
> "Agents are fully capable of lying. It is too late in the day for any of us to say that a man who works for the government high or low is not capable of lying. Indeed narcotic agents are quite capable of lying; of a twist here; or a twist there to make sure that they get on the scoreboard in this case to go all the way with the direction that had been planted initially with Stephen Silverman."

Defense counsel did not argue that the agents were merely mistaken in their observations because of poor lighting, or obstructions to their view, but rather that the agents had fabricated all of the incriminating things they reported they observed with respect to Wiener (Tr. 416-17):

> "The one genuine witness on the events or part of the events that happened the day in question, Mr. Arroyo. I ask you, ladies and gentlemen, can it be denied that this man gives the lie to the agents' testimony? Is there any question that he shows up for that part of what the agents have testified to where he was present; that the agents and there is no other way to say it, unpleasant as it might be, were lying in regard to those events?"

And, on the same subject with respect to Agent O'Connor (Tr. 418):

> ". . . that liar who came in here and embellished and gave you that circumstance because he thought that they need it to put away Richard Wiener. . . ."

And, as to Powers (Tr. 419):

> "Powers gets up and lies through his teeth this morning. Does that not leave such an odor with you that you can accept the testimony of these interested witnesses who want a conviction so badly, who want to put away my client, Mr. Wiener, that they are willing to lie in the courtroom . . . that they are willing to hold a gun to the head of Stephen Silverman by their conduct with him to get him to continue with his story."

Wiener's argument that somehow all defense counsel had in mind with these remarks was something less than a "frame" and that he had meant to indicate that the jury could believe large portions of Silverman's and the agents' testimony is spurious. A "frame" was the entire thrust of his summation and the trial judge was entirely justified in his description of that thrust. See, *United States* v. *Lotsoff*, 394 F.2d 619 (2d Cir. 1968).

Similarly, Wiener's assertion that the trial judge failed to tell the jury about his major defense theory is without merit. Defense counsel theorized that Larry Silverman was the real heavy and that Stephen Silverman had framed Wiener to protect Larry. This "theory" had no foundation in the evidence. If there had been a written request from defense counsel prior to summations, the trial judge could have reasonably rejected it. *Devine* v. *United States*, 403 F.2d 93, 95 (10th Cir. 1968), *cert. denied*, 394 U.S. 1003 (1969). But, counsel did not even submit a request to charge on his theory. Even if there had been enough evidence to justify outlining it to the jury, the trial judge was not required to do so *sua sponte*. See, e.g. *United States* v. *Esquer*, 459 F.2d 431, 435 (7th Cir. 1972), *cert. denied*, 414 U.S. 1006 (1973). There is no requirement that a trial judge develop every theory

of counsel during his charge to the jury, *United States* v. *Kahaner*, *supra*, 317 F.2d at 479, particularly when he received no notice that counsel was even interested in such a charge. *Cf. United States* v. *Birnbaum*, 373 F.2d 250, 263 (2d Cir.), *cert. denied*, 389 U.S. 837 (1967); *United States* v. *Hamilton*, 420 F.2d 1096, 1099 (7th Cir. 1970). Here the trial judge first learned of defense counsel's pressing need for such language after the jury was charged and ready to begin its deliberations, and then it was communicated in a tumble of other unfocussed oral objections (Tr. 506-15). The untimeliness of the request and the fact that counsel never proposed any corrective language also justified the trial judge in declining to add the theory to the charge. *Cf. United States* v. *Tourine*, *supra*, 428 F.2d at 869. Nevertheless, the judge recalled the jury and told them again that they were to consider all of the evidence and all of the arguments of counsel in their deliberations, including those he had not mentioned, and that it was their sole duty and function to reach a decision on the basis of their view of the evidence, not his (Tr. 515-17), as he had repeatedly told the jury during his main charge (Tr. 456, 457, 458, 478-79, 492, 496, 501, 505).*

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* Wiener also complains generally that the trial judge presented a one-sided, argumentative recitation of the facts. He was, however, never argumentative nor unfair. There are many facts in the Government's case which he omitted as well as facts from the defense case. The thrust of Wiener's contention seem to be that at specific instances during the charge, Judge Palmieri referred to certain portions of the testimony to illustrate legal principles. Thus, with respect to prior similar acts, in an excerpt conveniently omitted from appellant's brief at 55, the trial judge set forth in detail a limiting instruction with respect to the use of that evidence (Tr. 477-79). It is difficult to see how a limiting instruction can be made meaningful to a jury without describing what it is that is being limited. Appellant would apparently pre-

[Footnote continued on following page]

Wiener's final criticism of the trial judge's comments concerning the credibility of Stephen Silverman is frivolous. The remarks of the trial judge quoted in appellant's brief at 58 were preceded by a long explication with respect to credibility of witnesses (Tr. 492-496). In it the trial judge pointedly said (Tr. 494):

> A man with a criminal record and without an education can tell the truth. A man with a college degree and who is perfectly articulate and speaks with an Oxonian accent can be a liar. . . .

He then proceeded to give a lengthy accomplice charge, cautioning the jury, in detail, about Silverman's motivations for lying (Tr. 498-500). Only after this did he make his comments about Silverman's intelligence and articulateness on the witness stand which are cited as error by appellant (Tr. 503).* It was clear in the con-

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fer that hypothetical facts be used, but it is clearly within the trial judge's discretion to use facts from the case at hand, and it is probably more meaningful for the jury when he does so. Judge Palmieri continually reminded the jury that it was up to them to decide what the facts actually were. If his evidentiary references concentrated on the Government's case, this was so because the facts were one-sided. See e.g., *United States* v. *Tourine*, *supra* 428 F.2d at 869-70.

* Judge Palmieri's full comments were:

> "Now, ladies and gentlemen, you have this man before you and it is up to you to judge his testimony under the standards that I have expressed to you. I don't know how you are going to come out with respect to his testimony and, as I say, I do not wish to make any suggestions to you whatever, but I do say this: That regardless of how he comes out, Silverman is an extremely intelligent person. He considered every question that was put to him carefully and he articulated his responses with consumate care and I respectfully suggest that regardless of what else he may be he is a very intelligent person" (Tr. 502-03).

text of the charge and the trial, however, that Judge Palmieri was relating back to his statement about educated and articulate liars * when he put this estimate of Silverman to the jury, leaving the question up to the jury to decide. Upon Wiener's objections to these remarks, the trial judge in his supplemental charge once again emphasized Silverman's motives for lying (Tr. 517):

> "Now, on Silverman, this Stephen Silverman. Obviously he had a motive to lie. He had more than one motive to lie. He had as many motives to lie as he had federal offenses that he had committed and he admitted on the stand any number of offenses that he had committed, if you accept his statements about the wheeling and dealing in hashish.
>
> "If you think he lied and you didn't get the truth from him, that is your privilege and your duty, but please, don't permit me to govern your fact finding conclusions in any way."

Clearly the trial judge neither attempted to impose his own opinions and conclusions as to the facts on the jury nor acted as an advocate in advancing factual findings of his own.

When reviewed within the context of the entire charge, the summations of counsel, and the evidence presented at trial, there is no basis for Wiener's claim that the portions of the instructions challenged on appeal were "so unfair and unwarranted as to require reversal . . ." *United States* v. *LaVecchia*, 513 F.2d 1210, 1214-15 (2d Cir. 1975).

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* Silverman was the only witness at trial who testified about his education. He said he had received a college degree in history (Tr. 192-93).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Richard J. Hoskins being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 9th day of September, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Lawrence Goldman
GOLDMAN & HAFETZ
60 East 42d Street
New York, N.Y. 10017

And deponent further says that he sealed the said envelope and placed the same in the mail ~~drop~~ box for mailing ~~at~~ in front of the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Richard J. Hoskins

Sworn to before me this
9th day of Sept, 1975

Mary L. Avent

MARY L. AVENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977